

DEC 12 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of General Counsel

In the Matter of)
)
Rulemaking to Amend Parts 1, 2, 21,)
and 25 of the Commission's Rules to) CC Docket No. 92-297
Redesignate the 27.5-29.5 GHz Frequency)
Band, to Reallocate the 29.5-30.0 GHz)
Frequency Band, to Establish Rules and)
Policies for Local Multipoint Distribution)
Service and for Fixed Satellite Services)

To: The Commission

REPLY

FirstMark Communications, Inc. ("FirstMark"), pursuant to Section 1.429(g) of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission") and by counsel, submits its reply to the opposition filed by Teledesic Corporation ("Teledesic") on December 2, 1996, responding to a Joint Petition for Limited Reconsideration filed by Microwave Services, Inc. and Digital Services Corporation in the above-styled proceeding ("Joint Petition"). FirstMark responds to the Opposition because it wishes to ensure that the FCC is not misled as to FirstMark's reasons for filing for licenses in the Digital Electronic Messaging Service ("DEMS"). Further, FirstMark desires to demonstrate to the Commission that the antidotal reference to FirstMark provided by Teledesic is not relevant to the above-styled proceeding.

Background

The Joint Petition for Reconsideration asked for Commission reconsideration of that portion of the First Report and Order and Fourth Notice of Proposed Rule Making in the above-referenced proceeding which designated the 18.8-19.3 GHz band ("18 GHz band") for downlinks in the non-geostationary fixed satellite service ("NGSO-FSS"). The Joint Petition was filed because MSI/DSC was concerned whether the 18 GHz band could be shared on a co-primary basis by DEMS and NGSO-FSS licensees. The Joint Petition and Opposition appear to be part of an ongoing dispute between Teledesic and MSI/DSC which was initiated when Teledesic asked the Commission to suspend acceptance of applications for DEMS facilities and the processing of applications previously filed. The Commission granted the Request and imposed an application "freeze" as of August 31, 1996. Since that time, Teledesic has filed a petition asking the Commission to rescind the MSI/DSC authorizations and to deny pending applications filed by MSI/DSC or affiliated companies. MSI/DSC have filed a Petition to Deny the Teledesic application for its NGSO-FSS space station facility.

The sharing between DEMS and the downlink feeds for satellite service in the 18 GHz band must be addressed, but the resolution of such issue is not the revocation of existing DEMS licenses which were duly and validly granted.

Discussion

Teledesic characterizes the DEMS licensing since 1993 as "random licensing activity."¹ Teledesic, however, has had ample opportunity to air its concerns in regard to the FCC's policy relating to DEMS licensing, but failed to do so until years after FirstMark's initial applications were filed.

FirstMark cannot speak to MSI/DCS's activities, but FirstMark's initiated its licensing efforts based on a business plan developed in 1991 for the express purpose of implementing a DEMS network. The business plan was developed in consultation with a major equipment supplier and required significant technical and marketing input to design the proposed operating systems. FirstMark has pursued this plan by its filing of applications for DEMS facilities in Los Angeles, CA; San Francisco, CA; New York City, NY; and Boston, MA.

FirstMark filed its applications pursuant to rules and regulations duly adopted by the Commission. In those instances necessary, FirstMark also sought waivers of the rules to permit it to implement its business plan.² FirstMark's applications were placed on public notice, as required. Thereafter, the applications were granted in due course one year after they were filed. The FCC also issued a public notice upon its grant of the authorizations. There was full disclosure of all information relating to the DEMS facilities and to

1/ The Commission had an opportunity to review the DEMS licensing rules during its rule making procedure in which Part 21 and Part 94 rules were consolidated into Part 101. See WT Docket No. 94-148, et.al.

2/ The Commission had previously granted similar requests for waiver. See Central Telephone Company, FCC File Nos. 2-CE-P-92 through 21-CE-P-92.

FirstMark's plans. The FirstMark licenses were clearly not acquired either by subterfuge or stealth.

Since receiving its authorizations for its California facilities, FirstMark has constructed and made its nodal stations operational as required under existing FCC rules.³ FirstMark has been actively pursuing customers for its facilities, including local exchange and inter-exchange carriers such as PacTel, AT&T, and others. It is confident that its system will be providing service to subscribers well within the one year period in which such service must commence.⁴

Further, Teledesic's assertion that no DEMS facilities are or were operating in the "real world" is not accurate, but it is understandable as to why Teledesic would believe such is true. Unlike other radio services, such as Part 94 microwave services, Part 90 land mobile services, and Part 22 public land mobile service, the FCC does not have a database of current licensees which is made available on-line to the public. One of the few tools available for researching DEMS licensing are public notices issued by the FCC on a weekly basis. FirstMark has found that obtaining current information on the status of

3/ Teledesic previously has asserted that the Commission amended its rules to require a microwave facility to be rendering service to a customer in order to meet its construction requirements. See Consolidated Petition to Deny and Petition to Determine Status of Licenses, File No. 96007682 (lead application) filed by Teledesic on September 23, 1996, pp. 18-19. Although the Commission proposed such a rule, it declined to adopt such rule. See Report and Order (FCC 96-51), WT Docket No. 94-148; CC Docket No. 93-2; RM-7861, 11 FCC Rcd ___, ¶ 36 (1996). Accordingly, construction of the nodal station and the ability of such nodal station to operate is sufficient to meet the Commission's rules.

4/ See 47 C.F.R. § 101.305(d).

existing licensed DEMS facilities is somewhat time-consuming and may not provide the most accurate information.

Consequently, it is not surprising that Teledesic asserted that there are no operational DEMS in the real world, when in fact there are such DEMS systems.⁵ For example, Bell Atlantic holds a DEMS license (call sign WLA226) which operates on 18.880-18.890 GHz in Rochelle Park, NJ. Thus, the Commission should not consider the issue of sharing without a more thorough review of its records as to other entities which may be operating DEMS facilities, such as Bell Atlantic.

Finally, Teledesic highlights the FCC's error in issuing authorizations to both FirstMark and MSI in Los Angeles on the same DEMS channel. FirstMark and MSI are well aware of the error, and have been negotiating with each other in connection with the error. Rather than file a formal petition with the FCC, with all the attendant procedure and consumption of FCC resources, FirstMark believes that if both parties act in good faith, the matter will be resolved prior to FCC involvement.

Moreover, there have been similar types of erroneous grants in other radio services.⁶ Teledesic has no standing to raise the issue nor does it

5/ With the difficulties obtaining licensing information in connection with Part 21 DEMS authorizations, MSI/DSC's assertion that there were no "wide-area DEMS systems operational" may have lead Teledesic to conclusion that there were no DEMS systems operational, even on a SMSA basis.

6/ See Letter dated July 31, 1996 to Glenn Blan, OneComm Corporation from Terry L. Fishel, Chief, Land Mobile Branch, FCC (superseding FCC action taken on October 31, 1995, July 18, 1994, and June 16, 1994

provide any worthwhile solution. Nor is there any evidence that the duplicative grants were anything but an honest mistake made by the Commission staff. Thus, Teledesic use of this unfortunate event is irrelevant to the Commission's consideration in the instant proceeding.

Conclusion

FirstMark obtained its DEMS authorizations utilizing prescribed FCC procedures, and provided full disclosure of its use of such authorizations. The applications were based on a substantive business plan which FirstMark expended substantial time and money to develop. The applications were placed on public notice as required, and remained in a pending status for more than one year. The grant of the authorizations were also placed on public notice, as required. Teledesic, therefore, had notification of FirstMark's intentions in the 18 GHz band and had a substantial period of time in which it could have voiced its concern regarding the licensing of the 18 GHz band. FirstMark's authorizations were validly issued and the stations have been constructed and made operational in compliance with the Commission's rules.

Although the issues which have arisen in connection with the sharing of the 18 GHz band may have inconvenienced Teledesic in pursuing its business plan, Teledesic's solution of eliminating the ability of existing, constructed DEMS licensees to conduct their businesses is not one which FirstMark finds

and deletion of 800 MHz SMR frequencies erroneously granted); Letter dated July 12, 1996 to State of North Carolina c/o State Highway Patrol and Terry J. Romine, Esq. from Terry L. Fishel, Chief, Land Mobile Branch, FCC (rescinding State's use of 852.7125 MHz authorized on August 3, 1995 under call sign WPHX847.)

acceptable. The Commission should not be swayed by the size or resources of the entities which might wish to utilize the 18 GHz spectrum, but should provide an equitable solution for sharing the 18 GHz band in a manner which does not disadvantage existing licensees (which acquired authorizations and have made significant expenditures to pursue their business plans in accordance with Commission's rules and regulations) in the pursuit of their businesses.

Respectfully submitted,

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